IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS

[JUDGES GRIBBS, KELLY, AND SAWYER]

MARCIA SNIECINSKI,

Plaintiff-Appellee,

vs.

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Defendant-Appellant.

Supreme Court No. 119407
Court of Appeals No. 212788 C
Wayne Circuit 96-616254-CZ
(Hon. Marianne O. Battani)

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MANDEL I. ALLWEIL (P34115)
Attorney for Plaintiff-Appellee
821 S. Michigan Ave.
P.O. Box 3237
Saginaw, MI 48605
(517) 790-3222

BART M. FEINBAUM (P35494)
Attorney for Defendant-Appellant
600 Lafayette East, Suite 1922
Detroit, MI 48226
(313) 225-0849

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DEFENDANT-APPELLANT'S REPLY BRIEF

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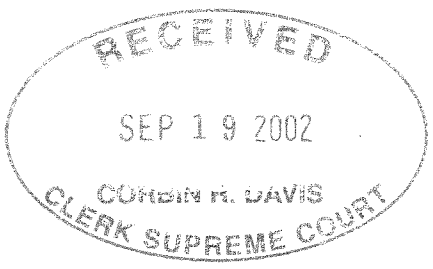

By: BART M. FEINBAUM (P35494)
Attorney for Defendant-Appellant
600 Lafayette East, Suite 1922
Detroit, Michigan 48226
(313) 225-0849

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I. REPLY TO PLAINTIFF'S RECITATION OF THE FACTS

Plaintiff's Brief is replete with misstatements and mischaracterization of facts from the record below.

A. Plaintiff inaccurately portrays BCNEM board members as employees of BCBSM

In reference to the purported relationship between Defendant Blue Cross and Blue Shield of Michigan ("Defendant" or "BCBSM") and its subsidiary, Blue Care Network of East Michigan ("BCNEM"), plaintiff asserts that "Board members of BCNEM were employees of BCBSM." (Plaintiff's Brief, p. 4). In support of this allegation, Plaintiff cites to her Appendix, pp. 411-412a. There are no pages 411-412a to Plaintiff's Appendix. There are pages 411b-412b, but they are pages from Plaintiff's Trial Exhibit 7, a performance appraisal of Plaintiff.

B. Plaintiff incorrectly portrays the hiring of BCNEM employees to BCBSM as a mere "formality"

Plaintiff represents as "undisputed" fact, that every BCNEM applicant who was hired by BCBSM as part of the Sales Effectiveness Project "was not technically a new hire" because, as plaintiff reasons, no BCNEM employee lost his/her BCNEM seniority when hired by BCBSM (Plaintiff's Brief, p. 5, n. 1). This assertion is only partially correct.

It is true that BCBSM did not require that BCNEM employees forfeit their earned BCNEM seniority as a requirement to being hired by BCBSM as part of the Sales Effectiveness Project. However, the record clearly shows that those BCNEM employees hired as part of the Sales Effectiveness Project *were* treated as new employees of BCBSM on the date they reported to work at BCBSM.

First, all of the BCNEM employees had their employment severed by their former employer, BCNEM. More specifically, the BCNEM Human Resources department completed

paper work *separating* the BCNEM marketing employees from their employment at BCNEM on November 19, 1993, three days prior to the effective date of the merger, so that these BCNEM employees could be *hired* by a different employer, BCBSM (Defendant's App., 396-397). Second, BCBSM Human Resources Senior Service Representative William Toples testified that one could only become an employee of BCBSM if he or she *actually began working* at the company (Defendant's App., 445-449). Stated differently, absent the critical step of reporting to work, the position of Account Representative (AR) offered to Plaintiff on August 25, 1993, was just "an invitation to join" the company (Id., 448).

Thus, the hiring of the BCNEM marketing employees as employees of BCBSM was more than a mere "formality" of transferring employees from one company to another as Plaintiff suggests in her Brief. (Plaintiff's Brief, p. 9, n. 7 & p. 10). In accordance with BCBSM policy as explained by Toples, the BCNEM former marketing employees were required to actually report to work at their new employer, BCBSM, as a condition of commencing their new employment relationship with BCBSM. (Defendant's App., 445-449).

All former BCNEM marketing employees, who *actually reported to work* on November 22nd, including Renee Cole who, like Plaintiff, was pregnant, became BCBSM employees on that date. (Defendant's App., 457-458). In other words, Plaintiff was not subjected to discriminatory treatment. Plaintiff simply never reported to work at BCBSM. Although Plaintiff had the completely original idea that she could have become a BCBSM employee by just signing papers (Defendant's App., 148-149, Plaintiff's Brief, p. 13, 40 n 37), a mere "perfunctory task as

Plaintiff describes it (Plaintiff's Brief, p. 43), the evidence and the law are to the contrary. (Defendant's App., 446-449).[1]

C. Plaintiff fails to provide the Court with an honest and accurate summary of how the long-term disability ("LTD") policy operated in this case.

Plaintiff first asserts that BCBSM was the "facilitator" of both the BCBSM and BCNEM LTD plans. (Plaintiff's Brief, p. 16). However, the portion of Plaintiff's Appendix cited for this alleged fact, pages 150-151, does not remotely reference this proposition. Similarly, Plaintiff represents that BCNEM Human Resources Manager, Patricia Stone, testified that both LTD policies were "administered" by BCBSM. (Plaintiff's Brief, p. 16). This is not an accurate summary of Stone's testimony. Stone testified that the two LTD policies shared the same administrator; however, Stone *never* testified that BCBSM was the administrator of both policies. (Plaintiff's App., 296b).[2]

Plaintiff next claims that because of her pregnancy, she was "the only individual who lost her position" at BCBSM. (Plaintiff's Brief, p. 11, n. 11). In support of this assertion, Plaintiff refers to Interrogatory Answers introduced into evidence, showing employees who left work on LTD leave. Plaintiff claims that in each instance, 89 out of 89 non-pregnant employees were placed back in their positions or comparable positions at the conclusion of their leaves. Plaintiff contends that she was the only person not returned to her position at the conclusion of her LTD leave, and this amounts to pregnancy discrimination. Id.

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[1] By requiring one to begin working before he or she is classified as an employee, BCBSM follows Michigan law that holds that at-will employment begins only when an individual actually starts working. Cunningham v. 4-D Tool Co., 182 Mich App 99, 106-107; 451 NW2d 514 (1990). In Plaintiff's 85-page Brief, Plaintiff fails to cite, much less address the holding in Cunningham.

[2] Plaintiff asserts that "[t]he decision to keep her on the books of BCNEM ... during the duration of her pregnancy was a decision that was made exclusively by Defendant BCBSM, the parent of BCNEM." (Plaintiff's Brief, p. 15). This statement is wholly unsupported by the record. Plaintiff cites no evidence for this proposition in her Appendix.

Plaintiff misleads the Court. It is true that the Attachment to the Interrogatory Answers shows that approximately 89 individuals who left on LTD were subsequently rehired when their leave expired. Importantly, however, Defendant BCBSM employed all 89 employees listed in the Interrogatory Answers. More specifically, the names comprising the listing of employees departing on LTD leave were derived from information sought by Plaintiff through Plaintiff's Third Set of Interrogatories, Nos. 4, 7, 9, & 10. These Interrogatories sought LTD information regarding *employees of Defendant BCBSM*, not of BCNEM. (Plaintiff's App., 500b-510b). Thus, the individuals cited on plaintiff's chart are not similarly situated to plaintiff, who always remained *an employee of BCNEM.*

The distinction that Plaintiff attempts to mask is that because she *never worked a day at BCBSM*, the BCBSM LTD policy did not apply to her. Plaintiff never received a paycheck from BCBSM (Defendant's App., 179). When plaintiff left work on short-term disability leave on September 10, 1993, BCN (not BCBSM) paid her short-term disability benefits (Id., 393-395). On March 1, 1994, plaintiff's short-term disability benefits ended at the conclusion of five full months. (Id., 392, 395). BCNEM (not BCBSM) then issued plaintiff a vacation pay out, an incentive pay, and administratively separated plaintiff from her employment. (Id.).

Given the undisputed fact that plaintiff never reported to work at BCBSM, the AR job was not "her position" as plaintiff represents to this Court. (Plaintiff's Brief, p. 16). Thus, the

BCBSM LTD policy provided Plaintiff with no "right" to that job when she sought to return to work following the conclusion of her *BCNEM LTD* leave.[3]

Plaintiff's administrative conversion to LTD status by BCNEM effective March 1, 1994 is a critical event in this case and fully explains the neutral treatment afforded to Plaintiff. While Plaintiff was an active employee of BCNEM (up until March 1, 1994), the AR position was reserved for her "no questions asked" (Defendant's App., 340-341), even though Plaintiff did not report to work on the actual date of the unification, November 22, 1993. However, the job could not be held open for Plaintiff forever. The AR job was Plaintiff's up until March 1, 1994, when BCNEM administratively converted Plaintiff to LTD status. (Id., 392-395), Stated differently, Plaintiff lost her "entitlement" to the AR job because she did not return to work prior to the date that she lost her status as an active employee of BCBSM. As much as she feels that this treatment amounted to discrimination, Plaintiff has offered no evidence that she was treated differently under the BCNEM LTD policy than anyone else or, more to the point, that her pregnancy had anything to do with the result in this case.

D. Plaintiff significantly misrepresents the trial testimony of BCNEM Human Resources Stone

Plaintiff represents that Stone did not allow Plaintiff (through her counsel) to inspect her Franklin Planner "under the claim of privacy and privilege." (Id., p. 18). This proposition is wholly unsupported by any citation to the Appendix and, in fact, Plaintiff introduced several pages of Stone's Franklin Planner into evidence. In addition, Plaintiff asserts that Stone testified

[3] BCNEM did, however, treat Plaintiff fairly in accordance with the terms of that company's LTD program. In a letter from BCNEM Human Resources Specialist April Williamson to Plaintiff, dated May 26, 1994, Williamson advised Plaintiff that her most recent position at BCNEM, telemarketing representative, was no longer open due to the marketing unification. (Plaintiff's App., 594b). This was a true statement as Plaintiff's former job at BCNEM had been eliminated as part of the Sales Effectiveness Project. However, Plaintiff did have re-hire rights under the BCNEM LTD policy. As Williamson explained in her letter, Plaintiff would be considered, along with other internal applicants, into openings at BCNEM as they occurred. (Id.). Plaintiff fully exercised her rehire rights, and was rehired by BCNEM effective December 16, 1994. (Defendant's App., 160).

that entries in her Franklin Planner "were not always contemporaneous." (Id.). This also is false as Stone testified that such entries were made "either ... while the person was there or after the person left." (Plaintiff's App., 268b).

Plaintiff next claims that Stone "had no recollection that Curdy made offensive pregnancy comment [sic] because she [Stone] did not have them noted." (Plaintiff's Brief, p. 18). However, Plaintiff's citation in her Appendix in support of this assertion, 400b-402b, does not support this proposition as these pages are excerpts from a totally unrelated performance appraisal of Plaintiff.

Plaintiff next argues that Stone "did nothing to follow ... up" on a complaint that Plaintiff made to Stone about Curdy allegedly referring to a chair in the office as a "pregnancy chair," and that Stone failed to note this comment in Curdy's file. (Plaintiff's Brief, p. 19). Plaintiff again mischaracterizes Stone's testimony. Stone testified that she did not pursue this matter any further after determining that this was essentially a "he-said she-said situation" between Plaintiff and Curdy. (Plaintiff's App., 272b).

E. Plaintiff misrepresents the record in attempting to portray Whitford as a pregnancy discriminator

As noted previously, BCBSM officials Whitford and Roseberry offered plaintiff the position of AR on August 25, 1993. (Defendant's App., 139). Plaintiff concedes that she has no evidence that Whitford or Roseberry were pregnancy discriminators (Id., 191, 193). Nevertheless, Plaintiff believes that Curdy, her BCNEM supervisor, somehow "poisoned the mind" of Whitford and Roseberry, by convincing them to revoke her offer of employment due to her pregnancy. (Id., 260).

Plaintiff concedes, however, that she has no idea of the type of daily contact that Curdy had with Whitford or Roseberry because she was not present at work to observe their

interactions. In fact, Plaintiff never overheard anything that Curdy may have said to these two men. (Defendant's App., 251). Importantly, Plaintiff's belief that Curdy somehow convinced Whitford and Roseberry to discriminate against her in not based on evidence, but rather her own personal opinion and speculation:

> Q. So any opinion that Mr. Curdy may have poisoned the mind of Mr. Whitford or Mr. Roseberry by revoking your job offer because you're pregnant is just your own personal opinion?
>
> A. Absolutely. (Defendant's App., 252-252).[4]

Plaintiff significantly misstates the record regarding conversations that Whitford and Curdy had with BCNEM Human Manager Stone after Plaintiff left on short-term disability leave on September 10, 1993. Plaintiff claims that Stone admitted on the witness stand that "Curdy and Whitford took hostile action against the Plaintiff as soon as they found out she was again pregnant." (Plaintiff's Brief, p. 24). This is untrue.

Curdy and Whitford did call Stone after September 10, 1993. Plaintiff was, indeed, pregnant on that date. However, the evidence does not support Plaintiff's assertion that these men called to discipline Plaintiff or that the conversations had anything to do with Plaintiff's pregnancy. The following represents the relevant testimony of Stone at trial:

> Q. Okay. Then on the 16th of September there is another conference call. ...
>
> A. Yes. There is another notation here. That is true.
>
> Q. "Mike Curdy, Don Whitford, conference call." And you have no notation specifically of what the conversation was. Is that true?

[4] Stone did not pursue Plaintiff's theory that Curdy tried to "sabotage" the interview process after she met with Plaintiff. When Stone asked Plaintiff to explain her reasoning, Plaintiff "didn't have any understanding of what that really was, what sabotaging meant." (Plaintiff's App., 273b).

A. ***My conversations at that time are regarding attendance.*** But there's no notation.

Q. Well, there is a little notation a little further down. It says: "Don wanted threat in personnel file." Is that true, ma'am?

A. That's the message I was talking to you about earlier there. Yes. He wanted that in the file. And I said it's not appropriate at this time.

Q. And did Mr. Whitford tell you why he wanted a threat in her personnel file?

A. When he used the term "threat" *he was talking about the counseling -- or that memo.* It wasn't this awful term "threat." But that's the term he used.

***

Q. What was the reason that he now thought that he needed to have a threat in her file, ma'am?

A. He felt that January 27, 1993 memo to file should stand in the file.

Q. *Because he now knew she was pregnant?*

A. ***No. Because she was continuing to have attendance problems. Not because she was pregnant.*** (Defendant's App., 422-424) (emphasis added).

Thus, Stone clearly testified that the conversations between Whitford and Curdy focused around Plaintiff's attendance, not her pregnancy. Thus, Whitford and Curdy wanted a counseling memo that had been previously issued to plaintiff on January 27, 1993 to stay in her file because Plaintiff, after September 10, 1993, was again experiencing an extended absence from work. Importantly, in none of the September 1993 conversations that Stone had with Whitford and Curdy, did Whitford or Curdy *ever discuss* revoking Plaintiff's August 25th job offer, the focal point of this lawsuit.

Regarding Whitford's curious use of the term "threat" in his September 16th conference call with Stone and Curdy, Stone explained that when Whitford used the term "threat," he was talking about the January 27, 1993 counseling memo that had been placed in her file by Curdy. (Defendant's App., 423). Even if the jury did not believe Stone on this point, there is no evidence in the record that Whitford or Curdy ever "threatened" Plaintiff in any form or fashion. After the conference call with Whitford and Curdy, Stone simply concluded that Curdy had not properly followed BCNEM company "protocol" in preparing the memo back on January 27, 1993 and, therefore, removed it from plaintiff's file. (Defendant's App., 418-419). As far as plaintiff's record was concerned, the memo never existed.[5]

II. ARGUMENT

1. There is no evidence supporting the conclusion that Plaintiff's job offer was revoked due to her pregnancy other than Plaintiff's own subjective opinion

In Harrison v. Olde Financial, 225 Mich App 601, 612; 572 NW2d 679 (1997), the Court of Appeals held that a plaintiff's burden at trial was to prove by a preponderance of the evidence that defendant acted with illegal discriminatory animus, **and** that the discriminatory animus was **causally related** to the decision-maker's action. Thus, the burden of proving discrimination falls squarely on the Plaintiff.

In its Brief on Appeal, Defendant provided a detailed analysis concerning the lack of evidence supporting liability in this case. (Defendant's Brief, pp. 14-23). Of particular

[5] In her Brief, Plaintiff further states "Not happy that Ms. Stone would not put a threat in the Plaintiff's file on 9-16-93 the two gentlemen [Whitford and Curdy] called back on 9-20-93. At this time they now want Stone to discipline her. This time they have summoned the help of Joel Gibson." (Plaintiff's Brief, p. 33). Ms. Stone's September 20, 1993 Franklin Planner notation simply states "Mike Curdy and Don Whitford called again. Question of Discipline. Didn't report -- per Joel Gibson." (Defendant's App., 425). There is no reference in her planner that Whitford or Curdy wanted new discipline issued. In addition, Plaintiff's suggestion that Gibson became involved in alleged wrongdoing is unsupported by a citation to her Appendix. Simply another attempt to mislead the Court.

significance was Plaintiff's admission that it was "absolutely" just her own "personal opinion" that Curdy "poisoned" Whitford's mind in revoking the job offer. (Defendant's App., 251-252). Importantly, when asked if she had any evidence to show that Curdy and/or Whitford revoked the AR job in May of 1994, plaintiff conceded that she did not even know who revoked it. (Id., 251-254).

There is no evidence that Curdy was Whitford's "right hand man," (a term that Plaintiff has created to suggest that Whitford somehow had no mind of his own) (Plaintiff's Brief, p. 45), or that he would condone pregnancy discrimination in the work place. Indeed, Plaintiff's theory that Curdy improperly influenced Whitford to revoke her job offer is wholly unsupported in view of Plaintiff's admission at trial that she did not consider Whitford or Roseberry as having a problem with the fact that she had been pregnant. (Defendant's App., 191, 193).

Clearly, Whitford and Roseberry extended Plaintiff an offer of employment when they knew she was pregnant. Given that undisputed fact, there is no evidence in the record establishing that this offer was thereafter revoked because of Plaintiff's pregnancy. Therefore, Defendant requests that this Court set aside the judgment below and dismiss Plaintiff's case for failure to establish disparate treatment discrimination. [6]

[6] In Krohn v. Sedgwick James of Michigan, 244 Mich App 289, 624 NW2d 212, 218 (2001), the Court of Appeals cautioned, "[r]emarks made by a single employee that are offered to show a discriminatory motive by a defendant corporation involve a particularly high risk of unfair prejudice." Curdy was an employee of BCNEN at the time he made all of the alleged discriminatory comments to Plaintiff. More specifically, the last discriminatory comment that Plaintiff claims Curdy made was in September 1993, when he allegedly told her, "I'll have to be sure to never hire anybody in child bearing years again." (Defendant's App., 198). This comment could not have been made to Plaintiff any later than on or before September 10, 1993, the last day she physically worked at BCNEM before commencing her short-term disability leave. (Id., 146-147). Curdy was still an employee of BCNEM on September 15, 1993. (Plaintiff's Appendix, p. 455b) (E-mail indicating, that "Mike Curdy's position level and job code have not been determined yet so he will not become a BCBSM employee until that is resolved."). Thus, the Court of Appeals below found the comments of Curdy, a non-employee of BCBSM at the time his statements were made, to be "direct evidence" of discrimination, and tied these comments to a finding of discriminatory motive and liability on the part of a *separate corporate entity,* the Defendant. To compound this significant error, the panel below then completely failed to address Defendant's burden in a "direct evidence" case, that it would have made the same employment decision despite Plaintiff's pregnancy status.

2. Defendant properly preserved its affirmative defense that plaintiff failed to mitigate damages in its first responsive pleading

Plaintiff argues that defendant waived its affirmative defense of mitigation of damages by not pleading such a defense as an affirmative defense in its first responsive pleading, its initial Answer. The trial court rejected this argument and the Court of Appeals correctly held that plaintiff failed to properly appeal this issue under MCR 7.207. (Defendant's App., 50, at n 4).

In Horn v. Dept. of Corrections, 216 Mich App. 58, 548 NW2d 660 (1996), defendant sought summary disposition on the basis that plaintiff's action was barred by the after-acquired evidence that plaintiff engaged in misconduct by engaging in a romantic relationship with an inmate. Plaintiff argued that defendant failed to raise this defense in its first responsive pleading, its answer.

The Court of Appeals agreed with defendant's contention that it did not have sufficient information at the time of its initial answer to plead the defense. More specifically, defendant did not possess evidence substantiating plaintiff's misconduct until her October 1992 deposition. The Court of Appeals concluded that the trial court did not abuse its discretion in granting defendant's leave to amend its answer.

In the case at bar, Defendant did not possess any information at the time of its original Answer, suggesting that Plaintiff failed to mitigate her damages. Defendant did, however, indicate in its original Answer that it "reserves the right to supplement its affirmative defenses as revealed during the course of discovery." (Defendant's App., 11). The information indicating that Plaintiff made absolutely no effort to mitigate her damages after she voluntarily quit her job at BCNEM was not revealed *until* Plaintiff's deposition was taken on December 20, 1996. The court rules do not permit a party to file a document unless it is well grounded in fact. MCR 2.114(D)(2). Had Defendant simply listed "failure to mitigate damages" as an affirmative

defense when it filed its Answer, and it turned out that Defendant had no basis for such a claim, the parties would have wasted time and energy pursing this matter.

The trial court correctly rejected Plaintiff's argument and the Court of Appeals properly held that Plaintiff failed to preserve this issue for appeal.

3. Plaintiff failed to establish a prima facie case of economic damages when she made the conscious choice to not look for any work after she voluntarily quit BCNEM. Given this unequivocal admission, Defendant is not required to then introduce evidence of comparable employment available in the market place that plaintiff could have acquired.

It is well settled that the burden shifts to a Defendant-employer to prove that a Plaintiff failed to mitigate damages only after the Plaintiff first establishes a prima facie case of damages. See, Michigan Dept. of Civil Rights v. Horizon Tube Fabricating, Inc., 148 Mich App 633; 385 NW2d 685, 688 (1986) citing Rasimas v. Michigan Dept. of Mental Health, 714 F2d 614 (6th Cir. 1983).

The case at bar represents the extreme situation of a completely apathetic and disinterested employee who admits to undertaking absolutely no prospective effort to mitigate damages by looking for work after she voluntarily quit her employment at BCNEM. (Defendant's App., 234). Given this undisputed admission, Plaintiff clearly failed to satisfy her prima facie obligation to reduce or mitigate her economic damages. After all, Plaintiff candidly states she made no efforts to look for any work. In view of the fact that Plaintiff made the conscious choice to not seek any work after she voluntarily quit BCNEM, for this Plaintiff, it certainly would not have mattered if Defendant introduced evidence of the existence of 10, 100 or 1000 jobs available in the marketplace. In other words, Plaintiff's suggestion that Defendant must introduce expert testimony to show that there were jobs available that she could have applied for, not only is not required by Michigan law, but would have amounted to a waste of

time at trial. Several courts have adapted the common-sense holding that an employer is released from its duty to establish the availability of comparable employment by proving, as Defendant did in this case, when a Plaintiff makes *no efforts* to seek employment. See, e.g., Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 54 (2d Cir. 1998); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527 (11th Cir. 1991); Sellers v. Delgado College, 902 F.2d 1189, 1193 (5th Cir. 1990).[7]

Plaintiff incorrectly suggests that an adverse inference arises by Defendant's failure to call expert witnesses to show that there were comparable jobs available once Plaintiff admitted to undertaking no effort to look for any work after quitting BCNEM. (Plaintiff's Brief, pp. 58-59). Federal courts follow the "missing witness" rule, under which a party is prohibited from asking the jury to draw an inference from the other party's failure to call a particular witness whom either party may call to the stand. Herbert v. Wal-Mart Stores, Inc., 911 F.2d 1044 (5th Cir. 1990) (containing a scholarly discussion of the reasons for the missing witness rule and the abrogation of that rule in light of the adoption of the Federal Rules of Evidence and Federal Rules of Civil Procedure); Jones v. Equitable Life Assurance Society of United States, 861 F.2d 655 (11th Cir. 1988).

In the case at bar, Plaintiff had the same opportunity to call Defendant's experts as witnesses as did the Defendant. The strategic choice by Defendant not to call such witnesses in light of Plaintiff's admission that she made no effort to mitigate damages was entirely appropriate. As the Herbert court noted, " the trier of fact may draw no inference from a party's mere failure to call a witness who is susceptible to subpoena by either party, and that it is

[7] SJI2d 105.41also provides that the burden is on the Plaintiff "to make every reasonable effort to minimize or reduce his/her damages for loss of compensation *by seeking employment.*" (emphasis supplied). There is no requirement under the standard jury instruction that a Defendant *must* show that there were substantially equivalent positions available when a Plaintiff fails to establish a prima facie case of mitigation.

inappropriate for counsel to argue to the fact finder that such an inference is permissible." 911 F.2d at 1048.

Finally, Plaintiff claims that the non-marketing representative job that she accepted when BCBEM rehired her on December 16, 1994 was "substantially inferior" to the AR position offered by BCBSM. (Plaintiff's Brief, p. 61). Plaintiff then argues that "[s]ince Plaintiff was not required to accept an inferior position, the relinquishment of that inferior position cannot be the basis to cut off the Plaintiff's damages." (Plaintiff's Brief, p. 62). First, Plaintiff claims that the telemarketing position that Plaintiff voluntarily accepted when she was rehired by BCNEM on December 16, 1994 was inferior to the AR job that she lost any entitlement to after she was converted to LTD status effective March 1, 1994. However, even assuming for purposes of this appeal that the telemarketing position accepted by Plaintiff in December 1994 job was arguably "inferior" because it paid a lower salary than the AR job, Plaintiff still had the burden to mitigate damages after she subsequently quit that job in 1996.

As this Court has held, the "sole interest" in requiring plaintiff to mitigate damages is "avoiding economic harm." Morris v. Clawson Tank Co., 459 Mich 256, 263; 587 NW2d 253 (1999). Thus, a plaintiff may not "purposefully remain unemployed or underemployed in order to maximize recoverable damages in the form of lost wages." Id. (emphasis added). Stated differently, even assuming that the telemarketing representative that Plaintiff accepted in December 1994 was "inferior" to the AR job, Plaintiff still had the obligation to look for work after quitting this so-called "inferior" job so as not to remain "underemployed" in order to maximize her potential for economic damages.[8]

[8] In support of her argument that the relinquishment an "inferior" job cannot be the basis for cutting off damages, Plaintiff cites to Brewster v. Martin Marietta, 145 Mich App 641; 378 NW2d 558 (1985) (Plaintiff's Brief, p. 62). In Brewster, the Court of Appeals observed that "[a]n offer by the employer to take the employee back in a position inferior to that from which he was wrongfully discharged cannot be used to minimize the damages." 378 NW2d at

In summary, given the finding by the Court of Appeals that (1) plaintiff voluntarily quit BCNEM and (2) Plaintiff's admission that she, thereafter, took no steps to look for work, it should have concluded that Plaintiff was not entitled to $125,000 in back pay or $136,000 in front pay. Plaintiff's enrollment in college on a casual basis, while at the same time completely removing herself from the job market during her time as a student, amounted to a complete failure to mitigate damages. (See Defendant's Brief on Appeal, pp. 32-37). As a consequence of Plaintiff's complete failure to mitigate, she is deprived of any entitlement to an award of any economic damages, either back pay or front pay. Therefore, this Court should summarily vacate the jury's award of back pay and front pay in this case.[9]

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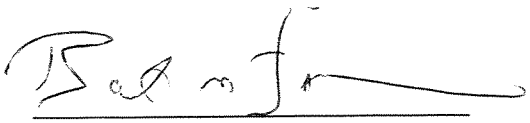
567. Brewster did not involve a situation remotely analogous to the case at bar, where Plaintiff readily admitted on the witness stand to looking for *no work* after voluntarily quitting employment at BCNEM. In addition, Defendant did not offer Plaintiff the alleged "inferior job." It was BCNEM, not BCBSM, which offered Plaintiff the telemarketing job that Plaintiff accepted on December 16, 1994. Thus, Brewster is clearly distinguishable on its facts.

[9] Plaintiff's argument that her decision to go back to school on a full-time basis reduced her economic damages from $436,212.69 to $261,180.26 (Plaintiff's Brief, pp. 72-74), not only is unsupported by law, but is a nonsensical proposition. First, Plaintiff never enrolled in school on a full-time basis. Second, Plaintiff should be entitled to zero economic damages given her total failure to take herself out of the market place by her conscious decision not to look for any suitable replacement work.

III. RELIEF REQUESTED

In consequence of the foregoing, Defendant requests that this Court set aside the judgment below and dismiss Plaintiff's case in its entirety for failure to establish a prima facie case of pregnancy discrimination. No remand is necessary. In the alternative, Defendant requests that this Court vacate the award of non-economic damages, and direct that economic damages be cut-off as of the date Plaintiff voluntarily quit her employment, September 20, 1996, as Plaintiff made absolutely no effort to mitigate her damages after that date.

Respectfully submitted,



BY: Bart M. Feinbaum (P35494)
Attorney for Defendant-Appellant
600 Lafayette East, Suite 1922
Detroit, MI 48226
(313) 225-0849

DATED: September 18, 2002